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*Proposed Counsel to Debtors and Debtors
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

In re:

TOMMY'S FORT WORTH, LLC, *et al.*,¹

Debtors.

)
) Chapter 11
)
) Case No. 24-90000
)
) (Jointly Administered)
)

**DECLARATION OF MATTHEW BORISCH IN SUPPORT OF
DEBTORS' EMERGENCY MOTION TO ENFORCE AUTOMATIC STAY AND
PUNITIVE DAMAGES FOR WILLFUL VIOLATIONS OF THE AUTOMATIC STAY
AGAINST MALIBU BOATS, INC. AND MALIBU BOATS, LLC**

I, Matthew Borisch, hereby declare under penalty of perjury:

1. I am the President of the "**Debtors**" or "**Tommy's**" or the "**Company**," which collectively refers to Debtor Tommy's Fort Worth, LLC and sixteen (16) of its affiliated Debtors: Tommy's Fort Worth, LLC; Tommy's Lewisville, LLC; Tommy's Holding Company, LLC;

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: Tommy's Fort Worth, LLC (3473); Tommy's Holding Company, LLC (2662); Tommy's Grand Rapids, LLC (9224); Tommy's Castaic, LLC (7501); Tommy's Lewisville, LLC (4750); High Country Watersports, LLC (6160); Walloon Lake Village Marina, LLC (0277); MKB Florida Holdings, LLC (5698); Tommy's Detroit, LLC (5242); Tommy's California Fresno, LLC (8597); Tommy's Phoenix, LLC (3036); Tommy's Las Vegas, LLC (7721); Tommy's Chattanooga, LLC (0839); Tommy's California Ventura, LLC (5149); Tommy's Rancho Cordova, LLC (1070); Tommy's Stockton, LLC (1338); and Tommy's Knoxville, LLC (8052).

Tommy's Grand Rapids, LLC; Tommy's Castaic, LLC; High Country Watersports, LLC; Walloon Lake Village Marina, LLC; MKB Florida Holdings, LLC; Tommy's Detroit, LLC; Tommy's California Fresno, LLC; Tommy's Phoenix, LLC; Tommy's Las Vegas, LLC; Tommy's Chattanooga, LLC; Tommy's California Ventura, LLC; Tommy's Rancho Cordova, LLC; Tommy's Stockton, LLC; and Tommy's Knoxville, LLC (collectively, the "**Debtors**") in the above-captioned chapter 11 cases (the "**Cases**").

2. I make this Declaration based upon my review of the Debtors' records as they are maintained in Tommy's ordinary course of its regularly conducted business activity. In the ordinary course of my employment at Tommy's, my duties include communicating with Malibu Boat and Debtors' Lender, M&T Bank. All references to Exhibits herein can be found in the *Appendix In Support Of Debtors' Emergency Motion To Enforce Automatic Stay And For Sanctions For Willful Violations Of The Automatic Stay Against Malibu Boats, Inc. And Malibu Boats, LLC*.

A. TOMMY'S BOATS

3. The Debtors are a high-octane water-sports-enthusiast brand known as Tommy's that began in 2012 in Colorado. Today, Tommy's is the largest Ski & Wake dealer globally. Currently consisting of fourteen (14) dealerships plus nine additional on-water rental programs operating in Texas, Colorado, Michigan, Arizona, California, Florida, Nevada, and Tennessee, Tommy's supplies a full suite of boat repair services, boat rental services, on-the-water fueling and docking services, retail sales of super-premium ski and wake boats, luxury cruisers, fishing boats, pontoons, flightboards, and retail goods & apparel at Tommy's Pro Shops. Tommy's is and always has been dedicated to bringing the absolute best products and services to its loyal customers.

4. Boat sales make up approximately eighty-two (82) percent of the Debtors' annual revenue. The majority of the Debtors' sales are new luxury watercraft primarily from original

equipment manufacturer (OEM) Malibu under two brands: Malibu and Axis. Axis is a Malibu-manufactured brand intended to be more entry market than luxury market. The Axis brand boats are advertised by Malibu at a price range of \$85,000-\$175,000 while the Malibu brand boats are advertised by Malibu at a price range of \$175,000-\$300,000. The Debtors are the largest dealer nationally for OEM Malibu Boats, accounting for approximately thirty (30) percent of Malibu's national towboat sales. The sale of Malibu boats² in their Exclusive Territories is a necessary and critical component of the Debtors' business. Without the ability to sell Malibu boats in their Exclusive Territories throughout the current boating season, there is no business to reorganize and no way for the Debtors to dig out from the hole created for it by Malibu³ and M&T Bank.⁴

B. MALIBU DEALERSHIP AGREEMENTS

5. For twelve (12) years, Malibu and each of Debtors' dealerships had a dealership agreement (the "**Dealership Agreements**").⁵ The term of the Dealership Agreements, with the

² Unless otherwise specified, any reference to "Malibu boats" includes both Malibu and Axis boats.

³ As set forth in the *Tommy's v Malibu, et al.* litigation pending in the U.S. Dist. Court E.D. of Tennessee (see **Ex. 47**), Malibu intentionally and fraudulently demanded that Tommy's increase its floor plan capability and proceeded to "pump Tommy's full of boats" (the most expensive, highest margin, slow selling Malibu boats) with full knowledge that the market analysis did not warrant such inventory levels, all with the intention of increasing its market share and artificially inflating its stock price during a historically low market demand. Malibu stakeholders disclosed this fact to Mr. Borisch directly at the Miami Boat Show in February, 2024 (i.e. that Jack Springer, CEO, "refused to turn off the spigot" and "pumped Tommy's full of boats" and Mr. Borisch was asked to "hold on" and advised not to pursue another OEM relationship as "Jack would not make it through this."). Jack Springer's employment was terminated the following week.

⁴ In September of 2023, when Malibu first drove Tommy's out of trust (aka SOT) with M&T, Matt Fahey of M&T acknowledged that he and M&T "dropped the ball" by failing to obtain the industry standard Repurchase Agreement from Malibu, as was ordinary course between Malibu and each of Tommy's floor plan lenders over the entire 12-year relationship (and as is ordinary course for Malibu and each of its other dealer's floor plan lenders). Tommy's subsequent learned from Malibu representatives that M&T "never even asked for the Repurchase Agreement" from Malibu at the time that M&T refinanced the Debtors' prior Fifth Third floor plan and that Springer was well aware of that fact from the time of the refinance. A market Repurchase Agreement would have benefited Tommy's/resulted in an offset to the M&T indebtedness of as much as \$100,000,000. See Email between Matt Borisch and Jack Springer RE: Follow Up (12.16.2022), a true and correct copy is attached hereto as **Exhibit "30."**

⁵ See Dealership Agreement for High Country Watersports, "Malibu 2023 Model Year Dealer Agreement" (7.1.22 – 6.30.23) ("**non-Texas MY23 Dealership Agreement**"), a true and correct copy is attached hereto as **Exhibit "1"**.

exception of those in Texas, run from July 1 to June 30.⁶ Other than the term of the Texas contracts and the location of each dealership, the Dealership Agreements are materially the same.⁷

6. Each Dealership Agreement provides exclusivity for the sale of Malibu and Axis boats to the dealership within a specific area (an “**Exclusive Territory**” and collectively the Debtors’ “**Exclusive Territories**”).⁸ Only upon a material breach of the Dealership Agreement (assuming Malibu did not commit an earlier material breach rendering Tommy’s performance impossible, which is what happened here) may Malibu appoint another dealer within an Exclusive Territory.⁹

7. Moreover, the Dealership Agreements provide that “Malibu will provide Dealer with a new agreement, or notice of non-renewal or termination, reasonably in advance of the expiration of this Agreement.”¹⁰

8. Historically—and consistently for each of the prior twelve (12) years—Malibu and the Debtors would allow the current Dealership Agreements to just about expire and only then would Malibu begin negotiations of new model-year Dealership Agreements while continuing to operate under the terms of the latest expired-term Dealership Agreement.¹¹

⁶ *Id.*

⁷ Compare Dealership Agreement for Tommy’s Lewisville, “Malibu 2023 Model Year Multi-Year Agreement” (7.1.22 – 6.30.25) (“**TX MY23 Dealership Agreement**”), a true and correct copy is attached hereto as **Exhibit “2”**, with, **Ex. “1”** (Texas Dealership Agreements are effective for multiple years, *i.e.* through 2025).

⁸ See, e.g., **Ex. “1”** (the specific term used in the Dealership Agreements for the Exclusive Territory is “Dealer Area.”).

⁹ *Id.* at ¶1.b.

¹⁰ *Id.* at ¶2.

¹¹ See *infra* footnote 12.

9. Around the time of the contractual expiration of the MY2023¹² Dealership Agreements (other than in Texas)—June 30, 2023¹³—the Debtors and Malibu took the same historic and ordinary course approach and began negotiations for the model year 2024 Dealership Agreements.¹⁴ On June 12, 2023, Malibu sent the first draft of the “Commitment Builder MY24” (the “**Commitment Builder**” is the annual excel workbook prepared by Malibu for negotiating the number of Malibu and Axis boats each dealer’s location will “commit” to purchase for the new Dealership Agreement, and such “commitment” is then included in the respective Dealership Agreement) and for the first time shared the MY24 Malibu & Axis Dealer Performance Programs.¹⁵ Despite historic lows in retail luxury power boat demand and sales activity and with full recognition that Malibu was not obligated to M&T via its ordinary Repurchase Agreement, Malibu’s June 12, 2023 Commitment Builder MY24 set Tommy’s MY24 commitment at 1160 boats even though the Debtors currently had more than 800 MY2023 Malibu boats in stock and the low season was approaching.¹⁶ Three days later, Malibu sent a request to the Debtors requesting a favor—that the Debtors *immediately* enter fifty-eight (58) MY24 boats in the order system—boats

¹² MY23 refers to Model Year 2023, which non-Texas MY23 Dealership Agreements had the term July 1, 2022 through June 30, 2023. The date that the non-Texas MY23 Dealership Agreements were executed was September 6, 2022. Compare **Ex. 1** at p.14, with, **Ex. 2**. For reference, the non-Texas MY22 Dealership Agreements (Model Year 2022) were executed on August 24, 2021. See Dealership Agreement for High Country Watersports, “Malibu 2022 Model Year Multi-Year Dealer Agreement” (7.1.2021 – 6.30.2022) (“**non-Texas MY22 Dealership Agreement**”), a true and correct copy is attached hereto as **Exhibit “3”**.

¹³ See **Ex. 1**.

¹⁴ See, e.g., Email Davenport to Wells, RE: MY24 Dealer Performance Programs and Commitment Builder with attachments (6.12.2023), a true and correct copy is attached hereto as **Exhibit “4”**.

¹⁵ Incentive Programs is defined herein at ¶ 20. See Commitment Builder MY24, MY24 Axis Dealer Performance Program, and MY24 Malibu Dealer Performance Program, true and correct copies are attached hereto as **Exhibits “5,” “6,” and “7,”** respectively. A true and correct copy of the email containing these attachments is attached hereto as **Ex. “4.”**

¹⁶ **Ex. 5.**

that Tommy's did not need – in order to *help* Malibu fill its July production as part of Malibu's order chase.¹⁷

10. Between June 13 and June 30, 2023, several virtual meetings were held between the parties, reviewing data and attempting to land on the correct commitment amount.¹⁸ On June 30, 2023, the Debtors sent Malibu the revised Commitment Builder requesting to set Tommy's commitment at 559 boats.¹⁹ For more than two (2) months, Malibu and the Debtors continued to discuss the MY24 Dealership Agreements and exchanged revised versions of the Commitment Builder; however, Malibu refused to send a Commitment Builder with fewer than 1160 as the Debtors' commitment.²⁰ On August 25, 2023, Malibu sent MY24 Commitment Sheets totaling 605 boats. The Debtors informed Malibu in person that they could not commit to that many boats, and they were nearing danger with respect to their current inventory due to the unreasonable number of Malibu boats that Malibu had forced upon the Debtors.

11. On or about September 2, 2023, Tommy's informed Malibu that it was officially SOT,²¹ and on September 3, 2023, the Debtors had a discussion with Scott Davenport of Malibu seeking assistance in right-sizing the inventory.²² Ultimately, the Debtors began cancelling stock

¹⁷ See Email from Scott Davenport to Mark Wells RE: July Orders due to today...Confirmed (June 15, 2023), a true and correct copy is attached hereto as Exhibit "8." Ultimately, the Debtors did enter the 58-boat order as requested by Malibu, which boats ended up *not* on the M&T Floorplan and out of trust, for which Malibu then used their status as *not* on the M&T Floorplan and out of trust to deny signing the MY24 Dealership Agreements. See Ex. See Email between Jack Springer and Matt Borisch, Ed Wells, and Dave Cluka, RE: Update/Conversation (1.17.24), a true and correct copy is attached hereto as Exhibit "9"; see also Email from Jack Springer to Mark Wells re: Tommy's Commitment Sheets (9.8.23), a true and correct copy is attached hereto as Exhibit "10."

¹⁸ See Ex. "8."

¹⁹ See Email Wells to Davenport RE: Commitment Builder MY24 – Tommy's MW Update 6.30.xlsx (6.30.23), a true and correct copy of the email and attachment are attached hereto as Exhibit "11."

²⁰ See Email from Scott Davenport to Mark Wells re: MY24 Commitment Sheets (August 25, 2023), a true and correct copy of the email and attachment is attached hereto as Exhibit "12" and Exhibit "13," respectively.

²¹ See Email between Borisch and Wells RE: Boat Orders (9.2.23), a true and correct copy is attached hereto as Exhibit "14."

²² *Id.*

boat orders.²³ On September 8, 2023, Davenport sent a revised MY24 Commitment Sheet totaling 535 boats.²⁴

12. On September 11, 2023, the Debtors tried to finalize the MY24 Commitment Sheets so the MY2024 Dealership Agreements can be signed, and Malibu CEO Jack Springer replied, “Tommy’s is SOT, which is one of the worst situations that can arise. Until Tommy’s is in good standing with M&T, no dealer agreement can be or will be signed. It is critical that Tommy’s resolve any and all SOT situations and has adequate, supported floorplan financing.”²⁵

13. The Debtors immediately began to work with M&T to resolve the SOT and in October 2023, M&T sent confirmation that the Debtors resolved the SOT.²⁶

14. On October 13, 2023, Malibu CEO Jack Springer confirmed by e-mail,

Following up with notes to next steps from our meeting so we are all on the same page. . . . **MBI and Tommy’s to work to write new dealer agreements for 2024** which currently expired in 2023 and do not exist. I believe these capture the major topics.”²⁷

15. Despite eight (8) months of discussions and being assured by Malibu that MY24 Dealership Agreements would be entered into, it was not until February 26, 2024 that Malibu informed Tommy’s that it was not going to enter into any MY24 Dealership Agreements.²⁸

16. Between July 1, 2023 (the day after the term of the MY23 Dealership Agreements) and March 13, 2024 (two days after Malibu alleges they terminated all Dealership Agreements

²³ See, e.g., Email from Scott Davenport to Mark Wells re Call (September 7, 2023), a true and correct copy is attached hereto as **Exhibit “15”** and Email from Scott Davenport to Matt Borisch and Mark Wells (September 5, 2023), a true and correct copy is attached hereto as **Exhibit “16”**.

²⁴ See Email from Scott Davenport to Mark Wells re Call (September 9, 2023), a true and correct copy of the email and attachment is attached hereto as **Exhibit “17”** and **Exhibit “18”**, respectively.

²⁵ See **Ex. “10”**.

²⁶ A true and correct copy of the letter is attached hereto as **Exhibit “19”**.

²⁷ A true and correct copy of the email is attached hereto as **Exhibit “20”**.

²⁸ See February 26, 2024 email from J. Springer, a true and correct copy of the email is attached hereto as **Exhibit “21”** and a true and correct copy of the letter is attached hereto as **Exhibit “22”**.

pursuant to the March 11th Letter (defined below)), Malibu delivered 131²⁹ boats to the Debtors, requested that Tommy's be the *sole dealer representative of Malibu* at 14 boat shows³⁰ (wherein Malibu promised the Debtors they would be entitled to Boat Show Program incentives³¹ and reimbursement for boat show attendance costs as was the ordinary course of dealing between the parties for 12 years), and included Tommy's in all of their MY23 and MY24 Incentive Programs.³²

17. Even after the March 11th Letter, Malibu requested that Tommy's be the *sole dealer representative of Malibu* at five (5) boat shows, attendance at and sales during which Malibu promised the Debtors they would be entitled to Boat Show Program incentives³³ and reimbursement for boat show attendance costs as was the ordinary course of dealing between the parties for 12 years:³⁴

Show	Date
Novi Boat Show	March 15 - 16 2024
Bakersfield/Sportsman Boat & RV Show	March 15 - 17 2024
Traverse City Boat Show	March 15 - 17 2024
Arizona Outdoor Expo	March 23 - 24 2024
Orlando Boat Show	April 5-7 2024

18. For what it is worth, this would not be the first time that Malibu was found responsible for fraud in connection with its failure to extend its Dealership Agreements.³⁵

²⁹ See Delivered Boats Excel, a true and correct copy is attached hereto as Exhibit "23".

³⁰ See Chart "Boat Shows Since 2023," a true and correct copy is attached hereto as Exhibit "24".

³¹ Boat Show Program incentives (referenced in the industry as BSP) are one of the many Incentive Programs offered by Malibu *only* to its dealers, and compliance with the specifications in any offered Incentive Program entitles the dealer (here, Tommy's) to the financial incentives outlined therein. See, e.g., 2024 Boat Show Program Incentives – Malibu ("2024 Malibu BSP"), a true and correct copy is attached hereto as Exhibit "26"; see also Email Davenport RE: Reminders – please read, attachments MY24 BSP (Dealer Name) reporting.xlsx (2.14.24), a true and correct copy is attached hereto as Exhibit "51".

³² See, e.g., 2024 Malibu BSP, Ex. "26"; see also PowerPoint "2023 Boat Show Program Malibu" ("2023 Malibu BSP"), a true and correct copy is attached hereto as Exhibit "27". Incentive Programs is defined herein at ¶ 20.

³³ Malibu has refused payment to Tommy's of any incentives, rebates, programs, sales events, bonuses, and/or reimbursements, including for the 19 boat shows that Malibu required Tommy's to attend on Malibu's behalf as the *sole dealer representative of Malibu*. See Ex. "24"; Spreadsheet "2024 Tommy's Internal Discount Tracker Malibu," a true and correct copy is attached hereto as Exhibit "28".

³⁴ See also Ex. "24".

³⁵ See, e.g., *Houghton, et al. v. Malibu Boats, LLC*, No. E2023-00324-COA-R3-CV (Tenn. Ct. App. 2024).

C. PRESSURE FROM MALIBU THAT THE DEBTORS INCREASE THE FLOOR PLAN

19. During the COVID-19 pandemic in 2020 and into 2021, domestic retail demand for recreational towboats increased to the highest levels seen by the industry in decades, as customers turned to boating as a form of outdoor, socially-distanced recreation.

20. Retail luxury power boat demand and sales activity (referred to in the industry as “retail registration”) began declining in the second half of the 2021 calendar year because of inventory shortages due to the strong sales activity during the pandemic and supply chain disruptions that began impacting production levels. During 2022, retail registration continued to decline at a lower year-over-year rate than even the second half of 2021. Forecasting for 2023 national sales of retail luxury power boats projected a drop of approximately 50% from 2022 sales.³⁶

21. In late 2022, despite the historic lows in retail registrations, Malibu began to pressure the Debtors to increase their available floor plan financing from \$30 million (drawn on a \$50 million facility with a \$10 million overlimit) to \$160 million.³⁷ Malibu represented to Tommy’s that Tommy’s was required to have a minimum of twenty-five (25) weeks of inventory in stock at the turn of the model year based on Malibu’s market analysis.³⁸ To have a minimum of twenty-five (25) weeks of inventory of 2023 model year, Tommy’s would have to increase its floor plan by more than a factor of five (5). Here, Malibu CEO Jack Springer fraudulently represented Malibu’s market data in order to demand that Tommy’s increase its floor plan limits and several Malibu representatives were aware.³⁹

³⁶ See PowerPoint “Ski-Wake Market Share,” a true and correct copy of which is attached hereto as **Exhibit “29”**.

³⁷ See Email between Matt Borish and Jack Springer RE: Follow up (12.16.22), a true and correct copy is attached hereto as **Exhibit “30”**.

³⁸ **Exhibit “5”** (25 weeks at June 30).

³⁹ See **Exhibit “30.”**

22. At the same time, in 2022, the Debtors had earned significant incentives and rebates through the sale of Malibu boats.⁴⁰ Numerous times each year, Malibu would offer various incentive programs including, for example, “Dealer Performance Programs,” “Hottest Ever Summer Sales Event” incentives, “Year-End Sales Event Programs,” “Boat Show Programs,” “Market Share Bonus” programs, and “Order Performance Incentives,” which would entitle dealers like Tommy’s to earn incentives related to sales of Malibu and Axis products (the “**Incentive Programs**”).⁴¹ The Incentive Programs are only offered to Malibu dealers and include, but are not limited to, interest reimbursement, rebates, advertising reimbursements, bonuses, and discounts.⁴² The Incentive Programs not only provided a key source of income for the Debtors, but the purpose of the Incentive Programs is to offset lulls in seasonal sales, increased costs, mandated advertising required by Malibu, and to cover the interest charged by a floor plan lender for inventory on the floorplan during low seasons; thus, the Incentive Programs are necessary to sustain a profitable business and to ensure no sales are out of trust.

23. Historical income and offsets received by the Debtors (and due and owing to the Debtors) from the Incentive Programs is set forth below:

⁴⁰ See 2017-2024 Summary Table of Historical Data, *infra* ¶23.

⁴¹ See MY24 Axis Dealer Performance Program and MY24 Malibu Dealer Performance Program, true and correct copies are attached hereto as **Exs. “6” and “7”**, respectively. See also 2019 Axis YESE, 2020 Malibu Axis BSP-Final, and Axis Summer Sales Rebates 2023, true and correct copies are attached hereto as **Exhibits “31,” “32,” and “33”**, respectively.

⁴² *Id.*

2017 – 2024 SUMMARY TABLE OF HISTORICAL DATA INCENTIVE PROGRAMS						
MY	Total # Boats Delivered	Tommy's Commitment #	# over/under	Rebates, Incentives & Interest Paid	Rebates, Incentives & Interest NOT Paid	# of Tommy's Dealerships
2017	217	240	-23	\$2,024,458.20	n/a	4
2018	380	275	105	\$2,333,767.16	n/a	5
2019	413	450	-37	\$2,655,512.90	n/a	5
2020	345	637	-292	\$2,425,474.20	n/a	7
2021	690	Malibu couldn't to meet COVID	build enough market demands	\$3,042,717	n/a	12
2022	1014	Malibu couldn't to meet COVID	build enough market demands	\$2,891,370	\$364,750	15
2023	1191	1234	-43	\$2,936,006	\$2,017,750	14
2024	157	No signed commitment	n/a	\$234,660	\$1,166,929	14

24. Beginning in or around late 2022, Malibu refused to pay the Debtors approximately \$365,000 of their earned incentives and rebates.⁴³ As late as February 7, 2023, Malibu confirmed that Malibu still has not paid the accrued and earned 2022 rebates and promised to “get . . . caught up this week.”⁴⁴ The Debtors never received those 2022 rebates. Rather, Malibu withheld the earned incentives and rebates and instead promised additional incentives in the future, but only if the Debtors complied with Malibu’s compulsory demands.⁴⁵ The Debtors never received those additional incentives either.⁴⁶ To date, as set forth below, Malibu owes the Debtors more than \$12 million in incentives and rebates.

TYPE of Rebate	DUE
2022 COOP ⁴⁷	\$364,750
2023 BCP ⁴⁸	\$666,250
2023 COOP	\$414,000
2023 QCP ⁴⁹	\$505,500
2023 MSB ⁵⁰	\$432,000

⁴³ See the total amount due to Debtors as summarized in the table in ¶23.

⁴⁴ See email from Scott Davenport, a true and correct copy is attached herein as **Exhibit “34”**.

⁴⁵ See email and attached letter from Jack Springer, true and correct copies are attached hereto as **Exhibits “21” and “22.”**

⁴⁶ See Email Matt Borisch and Jack Springer RE: MY2024 (09.05.23), a true and correct copy is attached hereto as **Exhibit “35”**.

⁴⁷ 2022 COOP means advertising dollars spent on Malibu’s behalf that are owed back.

⁴⁸ 2023 BCP means Boat Confirmation Payout.

⁴⁹ 2023 QCP means Quarterly Confirmation Payout.

⁵⁰ 2023 MSB means Market Share Bonus.

TYPE of Rebate	DUE
2024 OPI ⁵¹	\$258,500
2024 Interest ⁵²	\$508,429
2024 YESE Oct-Dec 2023 and BSP Discounts with no order ⁵³	\$1,506,950
Interest on 2023s since MBUU stopped covering ⁵⁴	\$5,302,285
Est 2024 COOP	\$400,000
TOTAL DUE TO TOMMY'S FROM MALIBU	\$12,983,664

25. When asked why Malibu refused to pay earned incentives, Malibu would claim that Tommy's failed to meet their commitments.⁵⁵ Yet it was not Tommy's who failed to order their commitments, it was Malibu who refused to "slot" (i.e. begin to manufacture) all of the boats that Tommy's ordered. Moreover, 2023 commitments have no relevance to the 2022 incentives that were earned and outstanding. For MY2023, the Debtors total number of boats was 1191, however it would have been higher (and thus met commitments) *had Malibu built the other 235 Axis boats that Tommy's had requested each month.*⁵⁶

Summary of Boats Requested v. Boats Slotted		
	# Boats Requested by Tommys	#of Boats Slotted
Jul-22	74	66
Aug-22	107	105
Sep-22	164	91
Oct-22	168	67
Nov-22	157	143
Dec-22	165	114
Jan-23	100	15
Feb-23	114	31
Mar-23	141	146
Apr-23	146	125
May-23	164	164
Jun-23	117	91
	1617	1158

⁵¹ 2024 OPI means Order Performance Incentive.

⁵² 2024 Interest means interest recapture that should have been paid by Malibu.

⁵³ 2024 YESE and BSP Discounts with no order means Year-end sales event and Boat Show program discount to be applied to future orders.

⁵⁴ Interest on MY2023s since MBUU stopped covering means interest that should have been paid by Malibu that was not paid.

⁵⁵ See February 26, 2024 email from J. Springer, a true and correct copy of the email is attached hereto as **Exhibit "21,"** and a true and correct copy of the letter is attached hereto as **Exhibit "22".**

⁵⁶ See *supra* ¶23 chart; see charts, *Requested v. Slotted (Malibu – Axis Mix)*, at *infra* ¶33.

26. Without the income and offsets from the Incentive Programs, retail margins on boats are especially small, and the only way to make up the margin shortfall was to sell more boats. Facing severe financial pressure without the income from the Incentive Programs, the Debtors succumbed to Malibu's pressure and increased their floor plan capacity from \$50 million to \$85 million with the Debtors' prior lender, Fifth Third Bank. Malibu wanted the Debtors to take on additional floor plan, but Fifth Third Bank reached its limit.

27. In March of 2023, the Debtors were introduced to M&T Bank ("**M&T**"), which had the ability to provide a larger floor plan to allow the Debtors to comply with Malibu's demands. By May 2023, with M&T financing, the floor plan increased yet again to \$110 million with a \$20 million overlimit.⁵⁷

28. Malibu represented publicly and to M&T Bank that Malibu would support the obligatory increased floor plan by entering into a market Repurchase Agreement with M&T.⁵⁸

Floor Plan Financing

Our North American dealers often purchase boats through floor plan financing programs with third-party floor plan financing providers. During fiscal year 2023, approximately 75% of our North American shipments were made pursuant to floor plan financing programs which our dealers participate in. These programs allow dealers across our brands to establish lines of credit with third-party lenders to purchase inventory. Under these programs, a dealer draws on the floor plan facility upon the purchase of our boats and the lender pays the invoice price of the boats. As is typical in our industry, we have entered into **repurchase** agreements with certain floor plan financing providers to our dealers. Under the terms of these arrangements, in the event a lender repossesses a boat from a dealer that has defaulted on its floor financing arrangement and is able to deliver the repossessed boat to us, we are obligated to repurchase the boat from the lender. Our obligation to repurchase such repossessed products for the unpaid balance of our original invoice price for the boat is subject to reduction or limitation based on the age and condition of the boat at the time of repurchase, and in certain cases by an aggregate cap on repurchase obligations associated with a particular floor financing program.

29. Repurchase agreements are a critical component of floor plan financing. A repurchase agreement is an agreement between the floor plan lender and the manufacturer that provides that the manufacturer would repurchase the remaining merchandise if the borrower does not pay off the floor plan and if the lender had to take title to the merchandise because of default of the borrower. A repurchase agreement greatly reduces the risk factor to the lender and the

⁵⁷ See Variable Rate Demand Note (Floor Plan) dated May 18, 2023 (the "**Floor Plan Note**"), a true and correct copy is attached hereto as **Exhibit "36"**.

⁵⁸ <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001590976/186a89fc-6d50-43c8-a26c-e129d3edf001.pdf>

borrower but places additional risk on the manufacturer, which acts as a check to ensure manufacturers do not oversupply retailers/borrowers. A repurchase agreement is customary and standard in the boat industry, and Malibu had entered into repurchase agreements with Fifth Third Bank (and each of predecessor lenders) of the Debtors on each and every one of Tommy's previous floor plan facilities.

30. Here, the repurchase agreement would have protected both M&T and the Debtors, because the repurchase agreement with M&T would have required Malibu to repurchase the Debtors' Malibu inventory that did not sell, as well as cover all carry interest (monthly interest during the low sales season) on the floor-plan obligations. Importantly, the repurchase agreement would also incentivize Malibu not to oversaturate a dealer (in this case the Debtors) with too much inventory. According to Malibu's own public filings, Malibu provides the lenders providing floor plan financing to its dealers with a repurchase agreement in the ordinary course:

Our North American dealers often purchase boats through floor plan financing programs with third-party floor plan financing providers. During fiscal year 2020, approximately 85% of our North American shipments were made pursuant to floor plan financing programs through which our dealers participate. These programs allow dealers across our brands to establish lines of credit with third-party lenders to purchase inventory. Under these programs, a dealer draws on the floor plan facility upon the purchase of our boats and the lender pays the invoice price of the boats. As is typical in our industry, we have entered into repurchase agreements with certain floor plan financing providers to our dealers (*emphasis added*). Under the terms of these arrangements, in the event a lender repossesses a boat from a dealer that has defaulted on its floor financing arrangement and is able to deliver the repossessed boat to us, we are obligated to repurchase the boat from the lender. Our obligation to repurchase such repossessed products for the unpaid balance of our original invoice price for the boat is subject to reduction or limitation based on the age and condition of the boat at the time of repurchase, and in certain cases by an aggregate cap on repurchase obligations associated with a particular floor financing program.⁵⁹

⁵⁹ Malibu Boats, Form 10-Q, Period Ending Dec 31, 2023 (available at <https://www.sec.gov/Archives/edgar/data/1590976/000159097624000012/mbuu-20231231.htm>). During the receivership, there were discussions among M&T,

31. However, despite its promises, its public filings, and the fact that a repurchase agreement is customary in the industry, Malibu ultimately reneged. To date, Malibu has yet to execute a repurchase agreement for the full floor plan with M&T.⁶⁰

32. Malibu's unrelenting pressure on Tommy's to increase its floor plan and Malibu's avoiding the ordinary course repurchase agreement with M&T (due initially to M&T's failure to obtain one at the inception of the loan), created the perfect storm for Malibu to take advantage of the Debtors., created the perfect storm for Malibu to take advantage of the Debtors. Malibu could now pump upwards of \$130 million of Malibu's highest-priced inventory on the Debtors without any risk or obligation to repurchase.⁶¹ Not only did Malibu push as many boats as possible on the Debtors, Malibu did so with mainly its most expensive, highest-margin line of boats, outside of the customary and Debtor-requested inventory mix of 65% luxury Malibu boats and 35% entry-level Axis-branded boats.⁶²

the Receiver, and Malibu about Malibu providing a repurchase agreement as part of a global settlement with the Receiver and M&T. In their Motion for Extension of Time to Respond to Complaint filed on June 2, 2024, Malibu stated that the receiver and Malibu discussed a commercial resolution of the matters underlying this lawsuit, which Malibu expected to resolve the case. A true and correct copy of the motion is attached hereto as **Exhibit "37"**.

⁶⁰ See January 17, 2024 email from J. Springer to M. Borisch, E. Wells, and D. Cluka, a true and correct copy of the email is attached hereto as **Exhibit "38"**; see also February 26, 2024 email from J. Springer, a true and correct copy of the email is attached hereto as **Exhibit "21,"** and a true and correct copy of the letter is attached hereto as **Exhibit "22"**.

In the late summer and fall of 2023, Malibu shipped \$6 million inventory to Tommy's that was not covered by M&T's floorplan financing. Malibu demanded payment of the \$6 million and dangled the promise of the model year 2024 Dealership Agreements being signed if the Debtors were able to pay the \$6 million. Between August and November 2023, M&T refused to add the \$6 million of Malibu inventory because Malibu repeatedly refused to provide the required repurchase agreement to M&T. After months of back and forth, in December 2023 the Debtors were able to convince Malibu to *at least* provide M&T a repurchase agreement on the \$6 million of forced inventory, to which Malibu agreed. To date, that \$6 million repurchase agreement is the only repurchase agreement between Malibu and M&T relating to the Debtors' floor plan. After Malibu received its \$6 million, Malibu's CEO Jack Springer pushed off any discussion of the MY2024 Dealership Agreements, saying "let's discuss Dealership Agreements in January." See **Ex. "9"**.

⁶¹ See Email RE: MY2024 (09.05.23), **Ex. "35"**.

⁶² See Charts, *Requested v. Slotted (Malibu – Axis Mix)*, at ¶33; see also Spreadsheet "Tommy's Malibu Orders 7.1.2023 to Current" (07.2023-current), a true and correct copy is attached hereto as **Exhibit "39"** (showing that orders delivered since July 1, 2023 to current are 58% Malibu and 42% Axis).

33. Additionally, Tommy’s would submit orders for the proper mix, yet time over time, Malibu would “slot” (i.e. begin the manufacture of) mostly higher-priced, highest-margin Malibu boats. For example, in both September of 2022 and February of 2023, the Debtors not only requested a larger number of total boats than Malibu slotted, but also the Debtors requested a higher percentage of the lower-priced Axis boats over luxury Malibu boats, but Malibu slotted the Debtors a higher percentage of Malibu boats, as shown below:

September 2022 Requested v. Slotted (Malibu - Axis Mix)				
	# Requested by Tommys		# Slotted by Malibu	
Malibu Boats	90	55%	55	60%
Axis Boats	74	45%	36	40%
Total	164	100%	91	100%
February 2023 Requested v. Slotted (Malibu - Axis Mix)				
	# Requested by Tommys		# Slotted by Malibu	
Malibu Boats	38	33%	18	58%
Axis Boats	76	67%	13	42%
Total	114	100%	31	100%

34. The Malibu-branded boats provide higher margins for Malibu. However, because of the higher price point, they tie up substantially more of the Debtors’ floor plan and cost the Debtors substantially more in carry interest due to the slow pace at which they are sold. By “pumping” the Debtors full of the higher-end, highest-margin Malibu boats, it became impossible for the Debtors to hit sales targets, burying the Debtors in carry interest, which Malibu promised to pay as an incentive⁶³ (and which, historically, Malibu had paid as reimbursements to the Debtors through 2022).⁶⁴ Malibu reneged on its contractual obligations to reimburse the Debtors for the

⁶³ See, e.g., **Ex. “6”** at 5. Winter Flooring Program (a) “Flooring interest expenses associated with MY24 model year boats will be paid for by Malibu Boats through April 30th if purchased before that date.

⁶⁴ See Carry Interest Earned by Tommys, attached hereto as **Exhibit “40”**.

carry interest. Malibu not only denied the Debtors their carry interest incentives and other rebates, but Malibu also refused to honor its commitment to enter into a repurchase agreement when M&T finally requested one month after the new floor plan was in place, Tommy's was buried with boats and SOT for the first time in 12 years.⁶⁵ The last month that Malibu paid any carry interest for Tommy's was for the month of March 2023.⁶⁶ Without reimbursement of their carry interest and without a repurchase agreement, there was nothing the Debtors could do.

D. MALIBU CONTINUED OPERATING UNDER THE DEALERSHIP AGREEMENTS UNTIL IT BLEED THE DEBTORS DRY.

35. Approximately a month after the Debtors entered into their floor plan financing with M&T, the MY23 Dealership Agreements, other than in Texas, expired by their terms on June 30, 2023. Notwithstanding the expiration, Malibu and the Debtors continued to conduct themselves as if the Dealership Agreements were still in place and that entering into new agreements was merely a formality.

36. Since July 1, 2023, Malibu delivered 131 boats to the Debtors, by far the most boats delivered to any Malibu dealer.⁶⁷ As is set forth above, the dumping of inventory on the Debtors without a repurchase agreement provided increased sales to Malibu in a significantly downturned market without any corresponding risk to Malibu, or so Jack Springer thought. Indeed, Malibu used the pumping of inventory into the Debtors to relate to the public that "[w]hile retail activity at our dealers trended lower during fiscal year 2023, given low inventory levels at the beginning of the fiscal year, we continued to experience strong wholesale demand throughout the first three quarters of fiscal year 2023."⁶⁸

⁶⁵ A true and correct copy of the email is attached hereto as **Exhibit "41"**.

⁶⁶ See, e.g., See February 26, 2024 email from J. Springer, a true and correct copy of the email is attached hereto as **Exhibit "21"**, and a true and correct copy of the letter is attached hereto as **Exhibit "22"**.

⁶⁷ See **Exhibit "23"**.

⁶⁸ Malibu Boats, Form 10-Q, Period Ending Sept. 30, 2023 (available at <https://www.sec.gov/Archives/edgar/data/1590976/000159097623000115/mbuu-20230930.htm>).

37. In February of 2024, at Malibu’s direct request, Tommy’s represented Malibu at the boat show in Miami.⁶⁹ While at the Miami boat show, Matthew Borisch, principal for all Tommy’s dealerships, was pulled aside by three Malibu stakeholders to discuss Tommy’s Dealership Agreements with Malibu. The stakeholders disclosed to Mr. Borisch that Malibu and its former CEO, Jack Springer, were “intentionally pumping Tommy’s full of inventory” in order to artificially inflate Malibu sales and market share when “most manufacturers are 70% too heavy on inventory and [Jack Springer] knows that. He “refused to turn off the spigot.”

38. By this time the Debtors learned of Malibu’s plan to oversell its inventory to the Debtors without a repurchase agreement, the Debtors had become overextended on their floor plan with an inventory mix that was difficult to sell. On February 27, 2024, M&T notified the Debtors that it would not be able to provide financing for additional boats, leaving the Debtors with stale inventory and the inability to bring in anything new.⁷⁰ Additionally, the Debtors could not fill custom boat orders, which made up a significant portion of the Debtors’ boat sales, because M&T would not allow the Debtors to deliver boats for which customers had given deposits, even when the Debtors asked if such boats could be delivered cash-on-demand by the customers.⁷¹

39. Using the Debtors’ financial difficulties with M&T—difficulties directly caused by Malibu’s actions—as pretext, on March 11, 2024 Malibu sent a letter to the Debtors purporting to “terminate” the Dealership Agreements at the Texas locations (the “**March 11th Letter**”).⁷²

⁶⁹ It is a contractual obligation in the Dealership Agreements and the Boat Show Program to represent Malibu at boat shows. *See Ex. 1* at Exhibit 2 *Performance Standards* ¶11 (pg. 18 of 40) (“You agree that you shall represent Malibu Products at the following boat shows: Denver, Ft. Collins, Colorado Springs”); *see also* MKB Florida Holdings’ Dealership Agreement “Malibu 2023 Model Year Dealer Agreement” at Exhibit 2 *Performance Standards* ¶11 (pg. 18 of 40) (“You agree that you shall represent Malibu Products at the following boat shows: Orlando/Clearwater/Tampa/St Peterburg/Jacksonville/Miami.”), a true and correct copy is attached hereto as **Exhibit “42”**.

⁷⁰ *See* February 27, 2024 letter: M&T notifies Debtors it would not provide financing (February 27, 2024), a true and correct copy of the email is attached hereto as **Exhibit “43”**.

⁷¹ *See* List of Deposits, a true and correct copy is attached hereto as **Exhibit “44”**.

⁷² March 11th Letter, a true and correct copy is attached hereto as **Exhibit “45”**.

Another letter followed on March 22, 2024 purporting “to confirm that Malibu does not anticipate entering into dealer agreements with any of the Tommy’s Dealerships . . .” (the “**March 22nd Letter**”).⁷³ After leading the Debtors on for months about the prospect of 2024 Dealership Agreements and continually performing as though the agreement were in place, it took only a few weeks after Malibu got everything it could out of the Debtors to simply attempt to walk away.

40. On April 10, 2024, after discussions between the parties failed, the Debtors filed a Verified Complaint (the “**Complaint**”) in the US District Court for the Eastern District of Tennessee, evidencing Tommy’s swift move to protect itself and preserve the status quo (i.e. no competitors or new Malibu dealers in the Exclusive Territories).⁷⁴ The Complaint (provided to Malibu in draft prior to filing) initially included a prayer for injunctive relief and was ultimately removed upon Malibu’s counsel indicating that Malibu had no issue continuing to honor the Dealership Agreements at least through the 2024 boating season.⁷⁵

E. MALIBU SIGNS WITH COMPETITOR DEALERSHIPS

41. The Debtors immediately disputed Malibu’s position in both the March 11th Letter and March 22nd Letter, setting forth the arguments contained herein. Instead of engaging with the Debtors, Malibu informed M&T Bank that it had terminated any and all Dealership Agreements with the Debtors. Days later, M&T Bank defaulted the Debtors based on the “new information” that there were no Dealership Agreements in place with Malibu – though all parties knew that Malibu, M&T, and the Debtors were functioning for more than nine (9) months under the terms of

⁷³ A true and correct copy of the letter is attached hereto as **Exhibit “46”**.

⁷⁴ Verified Complaint, Tommy’s *et al.* v. Malibu *et al.* (April 10, 2024), a true and correct copy is attached hereto as **Exhibit “47”**.

⁷⁵ See Email between Floyd Gates and Malibu’s Counsel RE: Tommy’s / Malibu (April 2024), a true and correct copy is attached hereto as **Exhibit “48”**.

the 2023 Dealership Agreements and were each relying on the promise that the 2024 Dealership Agreements (which by terms would have expired approximately 100 days later) were in progress.

42. Instead, Malibu almost immediately began discussions with competitor dealerships in the Debtors' Exclusive Territories to sell its products. To date, the Debtors believe at least eleven (11) agreements with competitors have been signed within the Debtors' Exclusive Territories.⁷⁶ For example, upon information and belief, Malibu entered into a Dealership Agreement with competitor Liquid Planet Marine in Clermont, Florida, within the Exclusive Territory of Tommy's Florida.⁷⁷ So close in fact, Liquid Planet intends to open its dealership two (2) doors down from the Debtors on the same day the Debtors filed this Motion. Many employees, including one of Tommy's top-ranking managers in the area, have given notice to Tommy's expressly to work for Liquid Planet as Malibu's "replacement dealer."

43. In fact, Malibu is already advertising their "replacement" dealers.⁷⁸

44. Adding insult to injury, the Debtors have been informed by store-level employees that *entire staffs have been made job offers* by the competitor dealerships now selling Malibu boats.

45. In fact, on Friday, May 31, 2024, the Debtors held a virtual all-staff meeting with all Tommy's locations. Then the Debtors held follow-up meetings with each store individually. The Fort Worth manager informed the Debtors' management that all but seven (7) Texas employees have received job offers from Malibu Texas, that Malibu Texas took over the Debtors' Fort Worth lease, and that Malibu Texas was opening a Fort Worth dealership at the Debtors' Fort Worth dealership and a brand new Lewisville dealership.⁷⁹ Despite the automatic stay and warnings by

⁷⁶ See Copy of Replacement Dealers to Stop 5.26.24 (May 27, 2024), a true and correct copy is attached hereto as **Exhibit "49"**.

⁷⁷ *Id.* Debtor MKB Florida Holdings, LLC does business as Tommy's Florida.

⁷⁸ See Advertisements, copies of which are attached hereto as **Exhibit "50"**.

⁷⁹ *Id.*

the Debtors to Malibu that poaching their employees was a violation of the automatic stay, Malibu continues to “replace” the Debtors in the Debtors’ Exclusive Territories and poach the Debtors’ employees.⁸⁰

46. Although Malibu does not want to recognize the continuation of their Dealership Agreements with the Debtors, (a) the historical and customary course of dealing between Malibu and the Debtors relating to the Dealership Agreements, (b) their historical actions between the contract term of each historical Dealership Agreement and the renegotiation of the next year’s Dealership Agreement, (c) their continued actions after the contract term expiration of the 2023 Dealership Agreements, (d) their statements and actions that a 2024 Dealership Agreement was forthcoming, and (e) their delivery of (and demand that Debtors’ accept and pay for) 131 boats between July 1, 2023 and March 13, 2024 establish that the full intent of the parties was that the Dealership Agreements are still in place.

47. Accordingly, the Court should enforce the automatic stay by requiring Malibu to honor the exclusivity provision of the Dealership Agreements. Moreover, to the extent Malibu has already violated the exclusivity provision of the Dealership agreements, the Debtors should receive punitive and compensatory damages for Malibu’s willful violations of the automatic stay.

Dated: June 4, 2024

/s/ Matthew Borisch

Matthew Borisch
President

Tommy’s Fort Worth, LLC; Tommy’s Fort Worth, LLC; Tommy’s Lewisville, LLC; Tommy’s Holding Company, LLC; Tommy’s Grand Rapids, LLC; Tommy’s Castaic, LLC; High Country Watersports, LLC; Walloon Lake Village Marina, LLC; MKB Florida Holdings, LLC; Tommy’s Detroit, LLC; Tommy’s California Fresno, LLC; Tommy’s Phoenix, LLC; Tommy’s Las Vegas, LLC; Tommy’s Chattanooga, LLC; Tommy’s California Ventura, LLC; Tommy’s Rancho Cordova, LLC; Tommy’s Stockton, LLC; and Tommy’s Knoxville, LLC

⁸⁰ *Id.*